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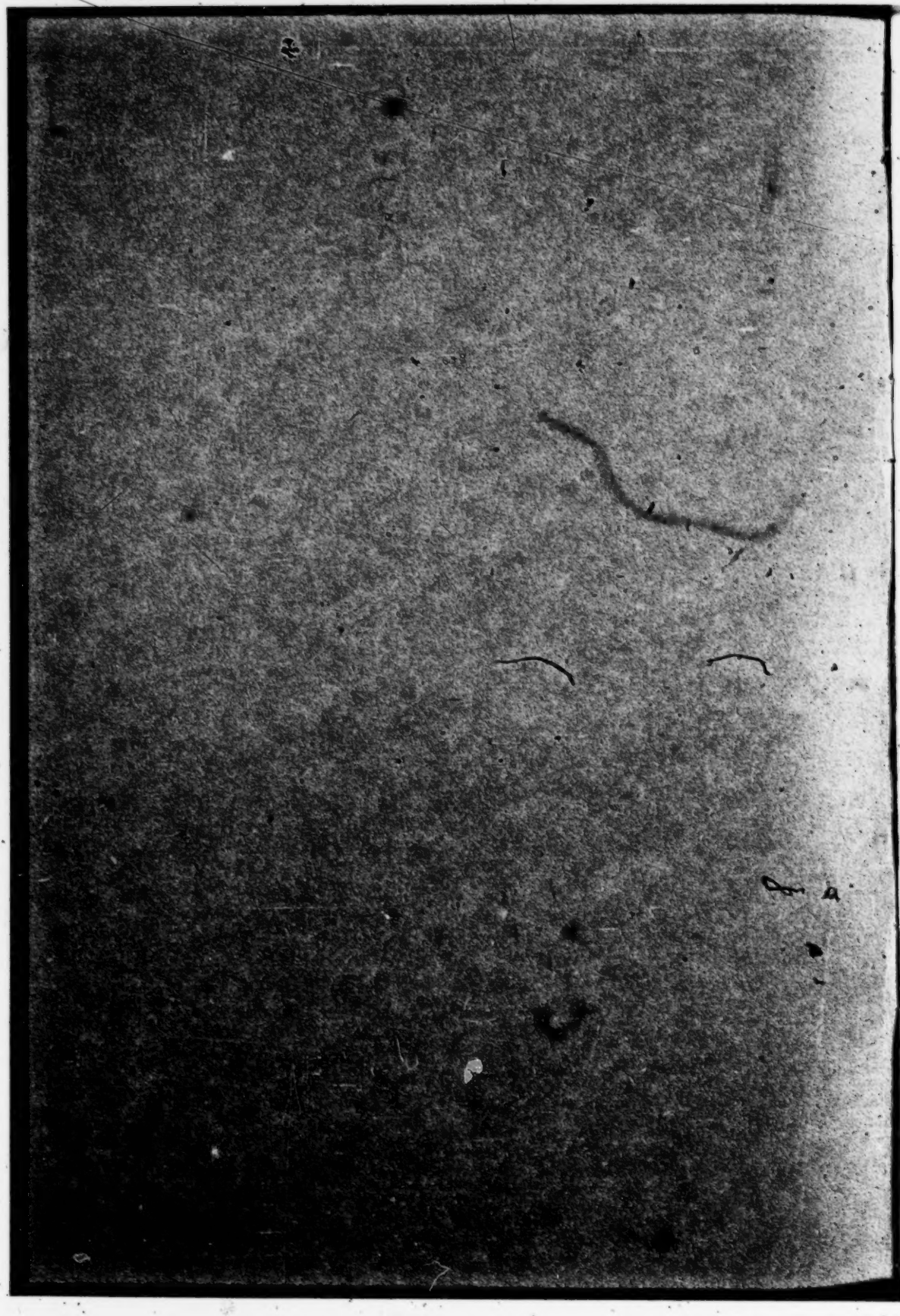

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CITATIONS

Cases:

NOS. 247 and 319

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

THE PUYALLUP TRIBE, *Petitioner*

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

NUGENT KAUTZ, ET AL., *Petitioners*

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE STATE OF IDAHO FISH AND GAME DEPARTMENT AS AMICUS CURIAE

STATEMENT OF INTEREST

The State of Idaho through its Fish and Game Department, being represented by its Attorney General, pursuant to Rule 42, par. 4, Revised Rules of the Supreme Court of the United States, urges the affirmation of the decrees of the Supreme Court of the State of Washington in *Department of Game*

v. The Puyallup Tribe, Inc., 70 W. D. 2d 241, 422 P.2d 754 (1967) and *Department of Game v. Nugent Kautz*, 70 W. D. 2d 270, 422 P.2d 771 (1967).

The Idaho Fish and Game Department is organized under Title 36 of the Idaho Code and has the duty to preserve, protect, propagate and manage the fish and wildlife resources within the State of Idaho and in waters boundary thereto.

The State of Idaho supports a large anadromous fishery resource and a sizable portion of the State's economic structure is built around sport fishing by residents and non-residents for anadromous fish.[1]

All anadromous fish migrating from the Pacific Ocean to their natal streams in Idaho must first ascend the Columbia River and then the Snake River where the same are subject to off-reservation fishing by Indians who are members of tribes located in Washington, Oregon and Idaho.

For the above and foregoing reasons the State of Idaho has long been concerned with the impact of off-reservation Indian fishing, both commercial and non-commercial on the anadromous fishery resources of the States of Washington, Oregon and Idaho.

A determination by the United States Supreme Court of the right of the State of Washington to impose reasonable and necessary regulations upon off-reservation treaty Indian fishing will also be determinative of the right of the State of Idaho to

[1] Over 250,000 licensed anglers spend over $35 million annually in Idaho. **Idaho Wildlife Review**, Vol. XVIII, No. 4, Idaho Fish and Game Department, March-Apr. 1966, page 3.

impose regulatory restrictions as are reasonable and necessary for the conservation of the fishery resource upon Indians in Idaho who claim treaty off-reservation fishing rights under treaty provisions identical to or very similar to the provisions of the Treaty of Medicine Creek, 10 Stat. 1132.

QUESTION PRESENTED

Whether treaty Indians fishing off their reservation at usual and accustomed grounds and stations are totally immune from state statutes or regulations established to be reasonable and necessary for the conservation of the fishery resource.

ARGUMENT

As was stated by Judge Rosellini of the Supreme Court of the State of Washington in *State v. McCoy*, 63 Wn. 2d 421 at page 426 *et seq.*, 387 P. 2d 942 (1963):

> To ascertain whether regulation is reasonably necessary for conservation of Pacific salmon, one must understand the life cycle of these fish.
>
> Pacific salmon are anadromous fish; that is, they are hatched in fresh water, descend to salt water, attain most of their growth there, and then return to the stream of their origin to spawn and perpetuate their kind. After spawning, they die. They have a well-developed homing instinct that enables them to return to spawn in the stream of their origin. Spawning occurs in the fall and winter in well-percolated gravel beds, where the fish bury their eggs to

protect them from predators and the elements. The eggs hatch in the gravel and the fish live there for a time, subsisting on the yolk material from the egg. After emerging from the gravel, the young fish begin to swim actively. Depending on the species, some salmon spend a year or more in fresh water before migrating to sea, while others leave for ocean environment within a few weeks or months after emerging from the gravel of the nest. Three to five years later, the chinook salmon return from the sea to the river of their birth to spawn.

After the various species of salmon near maturity and are in prime condition, they leave the extensive pastures of the sea to begin the long journey to the home stream of their origin. It is during this period of the salmon's life that the main effort toward harvest is concentrated. While still at sea the chinook, silver, and pink salmon are caught by the commercial and sports trollers off the coasts of Alaska, British Columbia, Washington, Oregon, and California. After these species enter the inside waters off the mouths of their spawning streams, their numbers are further reduced by net fisheries.

When the survivors escape the last net fishery in the rivers of their birth, they deposit their eggs in the gravel to perpetuate their kind, complete the life cycle and die.

There are three races of chinook salmon—spring, summer and fall—entering Idaho waters. Studies made of these fish indicate the races are separated from one another, if not altogether by time, by the

streams they use and different spawning areas. The races are separated primarily by the time of entry into the Columbia River, and to a degree on the time they enter Idaho waters. In addition to the chinook salmon, steelhead trout and a small run of sockeye salmon also ascend the Columbia River to spawn in Idaho waters.

It has been determined that Idaho's contribution to the anadromous fishery of the Columbia River above Bonneville Dam amounts to approximately 50 per cent of the "up-river run" of spring and summer chinook salmon and 65 per cent of the up-river Columbia River steelhead fishery. Due to the recent construction of hydroelectric projects in the Middle Snake River between Idaho and Oregon and the artificial propagation of all fall chinook now arriving at these dams, it is presently impossible to estimate Idaho's contribution to this race of fish.

In early days tremendous numbers of salmon and steelhead entered Idaho waters on their way to spawning beds. Descendants of these historic migrations still move up streams which remain open to passage but in numbers that may be counted as a fraction of the once great runs.

Historically the Indians fished mainly for salmon because of the fact that steelhead generally appeared to spawn in areas accessible to the Indians only during times of high water. Thus, the Indians could not take significant numbers of these fish with their primitive gear. However, the salmon

were available, arriving after the spring run-off and reaching their spawning grounds during periods of low water which made the fish vulnerable to the Indian fishery. The Indians, using leather webbed dip nets, willow traps and wooden spears and clubs, netted, trapped, speared and clubbed the salmon at major falls and along the shallow spawning beds.

In historic times, salmon could be trapped, netted, speared or snagged by Indians and non-Indians alike. However, in 1919 the use of traps and dip nets was prohibited; in 1921 the use of nets was prohibited, and in the early 1940's regulations were established to prohibit use of spears and snagging equipment. Section 36-902, Idaho Code, as amended. Reduced limits became effective in the mid-1940's. About the same time, Idaho started closing headwater tributaries of the Salmon River to protect salmon on spawning beds. Practically all of the upper drainages, and many sections of main streams, are now closed at one time or another to provide unmolested spawning. Method of take is now limited to a single hook in some waters and to a rod and reel in all waters. Season limits have been set to further conserve the resource. Salmon fishing seasons have been reduced in Idaho and were completely prohibited in the year 1965 as a part of the management program to permit escapement for natural spawning and perpetuation of the fish.

In addition to regulatory measures, the Idaho Fish and Game Department, in cooperation with

interested conservation agencies and private industry, has undertaken a large-scale program for the conservation of the resource. This program has involved the construction of hatcheries and artificial propagation and rearing facilities for salmon and steelhead; the restoration of chinook salmon runs in the Clearwater River drainage; the replacement of inadequate fish passage facilities at hydroelectric projects with new, adequate facilities; the construction of spawning beds and hatching channels on the Clearwater River drainage; the construction of fish passage facilities around natural obstructions in the headwater tributaries of the Salmon River and Clearwater River drainages; the removal of abandoned hydroelectric dams; and the construction of fish screen structures and by-pass facilities in the Upper Salmon River drainage to prevent loss of young salmon and steelhead during their downstream migrations. The expenditures in construction costs in this program has, since 1956, exceeded the sum of $30,000,000.00.

Despite the intensive conservation and restoration program, the future of the anadromous fishery in Idaho (and the Columbia River system) is clouded with hazards. Many factors such as dam construction, pollution, and the Indian and non-Indian commercial fishery, enter the picture and all affect the fish to a degree, not the least of which is the unregulated Indian commercial, "off-reservation" fishery.

Since the construction of The Dalles Dam, the

reported Indian catch of anadromous fish has climed; for instance, in the catch of steelhead, from a few hundred fish caught in the year 1957 to a catch of better than 15,000 fish being taken in the year 1967. This same picture is true for the races of spring and summer chinook. In 1957 the reported Indian catch of spring and summer chinook was less than a thousand fish. In 1967 the reported Indian catch amounted to 10,800 spring chinook, and 9,800 summer chinook, together with 35,000 sockeye, 11,500 coho and 37,900 fall chinook.[2] Generally speaking, the increase in the intensity of the Indian fishery on the Columbia River parallels their adoption and use of modern, efficient, nylon gill nets commencing some seven years ago, with an increase in the size of the catch every year thereafter. Concurrently, during the same period of time, the non-Indian commercial fishery below Bonneville Dam for these same runs of fish has steadily declined due to the imposition of reduced seasons.

It has been determined that the biggest problem with the Indian fishery on the Columbia River and its tributaries is the same that is existent with an Indian fishery on any other stream in the Pacific Northwest; that is, that this fishery is unregulated. Due to the fact that the Indian fishery is unregulated, the involved conservation agencies have no control over the off-reservation fishery and thus the size of its catch is unpredictable resulting in an

[2] "1967 Status Report on the Columbia River Commercial Fisheries," Oregon Fish Commission—Washington Department of Fisheries, January 1968.

unpredictable impact upon the necessary escapement of productive stocks of fish and in some cases the virtual annihilation of the brood stock.

A report of the impact of an unregulated Indian fishery upon the productive stock of a race of anadromous fish indigenous to a particular stream or watershed is contained at page 52 of the "74th Annual Report of the Washington State Department of Fisheries," 1964:

> The Yakima Indians were again active, and highly successful, in their spring chinook dip net fishery on the Yakima River during 1964. Fishing began in late April at Horn Rapids and Prosser Dams on the lower river and continued until mid-June at Sunnyside and Wapato Dams on the upper river.
>
> This very efficient fishery took an estimated 3,191 spring chinook which represents approximately 97% of the total run into the Yakima River System. The Roza Dam fish counts indicated only 33 spring chinook escaped into the upper Yakima River, the lowest escapement since counting started in 1940. Spawning ground surveys on the Naches River and tributaries revealed an escapement into this system of approximately 75 chinook.
>
> This was the third successive year that the Indian fishery has virtually exterminated the spring chinook run. In 1962 and 1963 the fishery took approximately 82% and 90% of the runs, respectively. Next season, 1965, marks the final year that this fishery will take an appreciable catch as the four year cycle will then be completed and returns from the low

escapements are anticipated to be negligible.

Experience has shown that once a specific run of fish utilizing a specific spawning area is exterminated, it has proven to be extremely difficult to restore the run to its former existent condition by means of transplantation of stock from other streams or watersheds.

The petitioners herein are laying claim to off-reservation treaty fishing rights by virtue of Article III of the Treaty of Medicine Creek (10 Stat. 1132) free from restriction in any manner "at usual and accustomed grounds and stations" where the state has not demonstrated that regulations are "indispensable" to the conservation of the fish. The pertinent treaty language states:

> Article III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * * (10 Stat. 1132).

The above-quoted terminology is found without significant variation in nearly all of the Indian treaties executed in the Pacific Northwest.[3] Despite this similarity of treaty language, state and federal courts in the States of Idaho, Oregon and

[3] For purposes of comparison we have reproduced in the Appendix pertinent articles of the Treaty with the Nez Perce (12 Stat. 957). See also Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinaielt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III.

Washington have varied in their construction of the treaty language as the same relates to off-reservation fishing and hunting.

In *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1954) the Supreme Court of Idaho held that the State was powerless to enforce its conservation laws against Nez Perce Indians hunting off the reservation on open and unclaimed lands ceded by the Indians to the United States. It is to be noted that *Arthur* is silent upon the question of off-reservation fishing rights, but at page 255 of the decision, the court briefly touched upon fishing rights:

> On the other hand, defendant urges that the reserved right to hunt on the ceded lands, unlike the reserved right to fish, was not in common with the citizens of the territory but constituted an unqualified, continuing property right reserved by the tribe and is not subject to state regulations * * *.

In *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) the Circuit Court of Appeals held that the State of Oregon could only apply its conservation laws and regulations to Indians fishing outside their reservation when the same were "indispensible" to the preservation of the resource.

In the decisions below, the Supreme Court of Washington held that the Puyallup and Nisqually Indians continue to have a right under Article III of the Treaty of Medicine Creek to fish outside reservation boundaries at usual and accustomed grounds and stations, but that their off-reservation

fishing rights are subject to state conservation laws and regulations which are reasonable and necessary to preserve the fishery (No. 247, A. 54; No. 319, A. 15).

It is generally recognized that the rationale of the Idaho Supreme Court in the *Arthur* case, *supra*, has been impliedly repudiated by the more recent decisions dealing with off-reservation treaty Indian fashing and hunting, and that it will not survive the test of time. A well reasoned critique of this case is set forth at page 525 of Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo. Wash. L. Rev. 504 (1964).

> The *Arthur* rule holds that Indians are exempt wholly from state regulation on off-reservation treaty hunting grounds. Even though certiorari was denied, it is doubtful that this holding will survive. The *Arthur* court felt that the Supreme Court had repudiated *Race Horse* and *Kennedy*, and that the *Tulee* statement approving state regulation was merely dicta. However, the Supreme Court in *Organized Village of Kake*, again in dicta, cited *Race Horse* and *Tulee* with approval. This certainly tends to neutralize if not repudiate the reasoning of *Arthur*.[4]

In considering the so called "indispensable" rule set forth by the 9th Circuit Court of Appeals in

[4] The decisions of this Court to which the author has reference are: **Ward v. Race Horse, 163 U.S. 504 (1896); New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916); Tulee v. Washington, 315 U.S. 681 (1942) and Village of Kake v. Egan, 369 U.S. 60 (1962).**

Maison v. Confederated Tribes of the Umatilla Indian Reservation, supra, we are pursuaded by the extensive analysis by the Court below in answer to the Court of Appeals theory and submit that it lays the same to rest (No. 247, A. 50-53). We direct this Court's attention to a portion of the lower Court's opinion which points out the fact that the "indispensable" test for regulation of the off-reservation Indian fishery places an impossible burden upon the state in meeting its duty of conserving the resource for the benefit of all of its citizens, Indian and non-Indian alike.

> We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra,* read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.
>
> It would make the competent exercise of the state's inherent power of preservation an impossibility. (No. 247, A. 52)

Under the Tenth Amendment to the Constitution of the United States the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people. By virtue of this Amendment the Supreme Court of the United States has historically held that title to the wildlife resources insofar as they are capable of ownership, vests in

the state as trustee of *all* the citizens of the state. Therefore, neither the Federal Government nor the Indian tribes have the power to regulate the wildlife resources of the states.[5] Further, the states have no power to convey their title to these resources nor to relinquish any of their police powers of management of the same; and in this regard the Supreme Court of the United States has never held that the states lack power to control off-reservation fishing and hunting by treaty Indians.

The leading case supporting a state's right to regulate fish and game within its borders is *Geer v. Connecticut*, 161 U.S. 419 (1896). This case held that the states inherited from the original colonies the rights that the colonies inherited from the Crown of England.

That this doctrine extends to control of off-reservation hunting by treaty Indians in states later admitted to the union was settled by *Ward v. Race Horse*, 163 U.S. 504 (1896), which held:

> The power of the state to control and regulate the taking of game cannot be questioned. (163 U.S. 507)
>
> . . . on her (Wyoming's) admission into the (union) she at once became entitled to and possessed all of the rights of dominion and sovereignty which belonged to the original states . . . . (163 U.S. 513) (Parenthetical material supplied)

Doubtless the rule that treaties should be so

[5] See 25 C.F.R., Part 256—Off-Reservation Treaty Fishing. Sec. 256.1 (a) (6).

> construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an Act of Congress, and also destructive of the rights of one of the states. (163 U.S. 516)

This case is the genesis of the "equal footing" doctrine and has never been overruled but has recently been cited with favor by the Supreme Coure in *Village of Kake v. Egan*, 369 U.S. 60 (1962).

The fallacious doctrine of dual sovereignty over the fishery and wildlife resource was firmly repudiated in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). Here the Seneca Indians, supported by the United States Department of the Interior in its brief, argued that they could regulate Indian fishing and the state could regulate non-Indians. The Court rejected this proposition and ruled that dual regulation was no regulation at all and would only give to each the power to destroy the resource. At pages 563 and 564, the Court stated:

> . . . We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or to so divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of

> fishing and hunting upon the granted lands *in common* with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, which inhered in the sovereignty of the State over the lands where the privilege was exercised . . . (Emphasis supplied)
>
> . . . We also assume that these Indians are wards of the United States, under the care of an Indian agent; but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the *locus in quo*. *Ward v. Race Horse, supra; United States v. Winans, supra.*

This *amicus curiae* submits that *United States v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), merely held that the Yakima Indians under the provisions of Article 3 of the Treaty with Yakama Indians, June 9, 1855, (12 Stat. 951) had the right to resort to the fishing grounds of the Columbia River and to "make use of them in common with the other citizens of the United States." (249 U.S. 199) These two cases in effect did nothing more than recognize the survival of this "in common" right as against private interference and certainly did not vest in the Indians a superior or exclusive right as is advocated in *Maison v. Confederated Tribes of Umatilla Indian Reservation, supra,* and *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

In 1942 the Supreme Court decided *Tulee v. Washington*, 315 U.S. 681. The actual holding in

Tulee was that the Indians' off-reservation treaty rights exempted them from state license fees. The Court held, in dicta, that the state could regulate the Indians' fishing.

> . . . the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. . . . (315 U.S. 684)

Again, in dicta, and also at page 684 of the decision, the Court said:

> From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. (315 U.S. 684)

While the language relied upon in *Tulee* by the Ninth Circuit Court of Appeals in *Maison, supra,* with respect to the state's regulations being "indispensable" for conservation is pure dicta and was unnecessary to the actual holding in *Tulee,* i.e., exemption from state license fees, it is nevertheless apparent that the Supreme Court was thinking in the terms of an individual Indian's dip-bag net fishing operation which would be considered "primitive" when compared to a modern, unregulated, destructive, Indian gill net fishery of today.

The Supreme Court reiterated its support of state regulation in the case of *Village of Kake v. Egan,*

supra, decided in 1962. This case involved an attempt by the United States Department of the Interior to license and permit certain Thlinget Indians of the Villages of Kake and Angoon to operate fish traps in violation of the anti-fish-trap conservation law of the State of Alaska. Justice Frankfurter, speaking for a unanimous court, cited *Ward v. Race Horse*, *supra*, and *Tulee v. Washington*, *supra*, as support for its statement at pages 75 and 76 of the decision:

> Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.
>
> True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are

no merely local matter.

Kake, therefore, finally establishes that a state may regulate off-reservation hunting and fishing activities where the same are exercised by treaty Indians and that it may also apply its conservation laws to Indians claiming special privileges based on aboriginal use and occupancy. The case firmly rejected the attempt by the United States to enforce regulations governing off-reservation Indian fishing when the same are violative of state conservation laws.

CONCLUSION

For the foregoing reasons, the State of Idaho Fish and Game Department, as *amicus curiae*, respectfully urges that the decisions below in Case No. 247, The Puyallup Tribe v. Department of Game of the State of Washington, et al., and Case No. 319, Nugent Kautz, et al. v. Department of Game of the State of Washington, et al., be affirmed.

Respectfully submitted,

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